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a.m.
Date: 12-10-90

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:	)	Chapter 11 Case
	)	Number 85-40639
DONALD E. AUSTIN	)	
	)	
Debtor-in-Possession	)	
	)	
DONALD E. AUSTIN	)	
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 90-4041
SIGNET COMMERCIAL CREDIT CORPORATION	)	
	)	
Defendant	)	

ORDER

On November 1, 1990 a hearing was held on the motion of Signet Commercial Credit Corporation ("Signet") defendant in this adversary proceeding to compel Donald E. Austin ("Austin") plaintiff to answer interrogatories. During the course of the hearing, Mr. Austin, appearing pro se,[1] challenged this court's ability to continue as the presiding judge in this matter. Mr.

[1]Mr. Austin is a lawyer admitted to practice in this court.

Austin raises three charges which if sustainable require recusal. Mr. Austin contends that

> 1. I have prejudged this adversary proceeding;
> 2. because of personal animosity felt by me against Mr. Austin, I am incapable of being fair and impartial in this proceeding; and
> 3. because the Honorable Lamar W. Davis, Jr., Chief Bankruptcy Judge for the Southern District of Georgia prior to his appointment as Bankruptcy Judge and while a lawyer engaged in private practice, represented an interest adverse to Mr. Austin in not only Mr. Austin's underlying Chapter 11 bankruptcy proceeding but also other related cases;

therefore my disqualification is required.

In support of these allegations, Mr. Austin asserts that

> 1. I have never ruled in Mr. Austin's favor in any matter; and
> 2. in a hearing in Mr. Austin's underlying Chapter 11 proceeding immediately preceding this hearing this court vacated a temporary restraining order and refused to issue a preliminary injunction to prevent the foreclosure auction sale of an interest in property of Mr. Austin.

As Mr. Austin's assertions reach beyond this adversary proceeding I have reviewed the record of not only this case but also Mr. Austin's underlying Chapter 11 case, In re: Donald E. Austin, Chapter 11 case No. 485-00639 (Bankr. S.D. Ga. filed October 1, 1985), and other related bankruptcy proceedings, In re: Diamond Manufacturing Co.. Inc., Chapter 7 bankruptcy case No. 485-00555 (Bankr. S.D. Ga. filed August 29, 1985), In re: Rose Marine. Inc., Chapter 7 bankruptcy case No. 486-00143 (Bankr. S.D. Ga.

filed February 18, 1986) and numerous related adversary proceedings brought under each case. From the record of these cases, this court

determines no basis for recusal.

This court's determination on the issue of disqualification is governed by Bankruptcy Rule 5004[2] and 28 U.S.C. §455[3]. Unlike 28 U.S.C. 144 which by its terms applies to

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[2]Bankruptcy Rule 5004(a) provides:

> (a) Disqualification of Judge. A Bankruptcy Judge shall be governed by 28 U.S.C. 455, and disqualified from presiding over the proceeding or a contested matter in which the disqualifying circumstance arises or, if appropriate, shall be disqualified from presiding over this case.

[3]28 U.S.C. 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
> (1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law or served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (e) no justice, judge or magistrate shall accept from the parties to the proceeding a

district

court proceedings [In re: B & W Management Inc., 86 B.R. 1 (Bankr. D.D.C. 1988)] and which contains specific procedural provisions required to raise disqualification, 455 does not require compliance with any such similar procedures. Phillips v. Joint Legislature Com. etc., 637 F.2d 1014 (5th Cir. 1981), cert. denied. 456 U.S. 960, 102 S.Ct. 2035, 72 L.E.2d 483 (1982). Section 455 is self-enforcing requiring no action by the parties. U.S. v. Sibla, 624 F.2d 864 (9th Cir. 1980); Idaho v. Freeman, 507 F.Supp. 706 (D. Idaho, 1981). Disqualification under §455 could take place sua sponte, without the necessity of affidavits and certificates of good faith as required under §144. U.S. v. Clark, 398 F.Supp. 341 (E.D. Pa. 1975) aff'd without op. 532 F.2d, 748 (3rd Cir. 1975). Once the issue of disqualification is raised, even through argument by a party and not by formal motion, it is incumbent upon the court to resolve the issue in order for the matter at hand to proceed either with this judge; or, if appropriate, before another court unfettered by a lingering question of partiality or prejudice. Section 455 clearly imposes a duty directly on the judge to evaluate his own conduct and pass on the disqualification issue. See e.g. Levitt v. University of

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> waiver of any grounds or disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is proceeded by a full disclosure on the record of the basis for disqualification. . .

Texas, 847 F.2d 221 (5th Cir. 1988, cert. denied 488 U.S. 984, 109 S.Ct. 536, 102 L.E.2d 567 (1988); U.S. v. Greenough, 782 F.2d 1556 (11th Cir. 1986); In re: Corregated Container Anti-Trust Litigation, 614 F.2d 958 (5th Cir. 1980); cert. denied, sub. nom. Mead Corp. v. Adams Extract Co., 449

U.S. 888, 101 S.Ct. 244 66 L.E.2d 114 (1980); Wright, Miller & Cooper, 13(a) Federal Practice & Procedure 2d. §3550 (1984).

An analysis under §455 begins with a determination whether a factual basis exists for disqualification under §455(b). In this case, no factual basis exists for disqualification. Mr. Austin is simply incorrect in his belief that this court harbors any personal bias, prejudice or dislike for him or that I have prejudged this case. As to Mr. Austin's factual assertion that this court has never ruled in his favor in any proceeding he is also incorrect. Assuming Mr. Austin's allegation of adverse rulings were correct, the fact that a judge rules adversely to a party is not evidence of prejudice or bias against the party. The appropriate avenue to redress a perceived incorrect ruling is by appeal not by challenging in argument this court's impartiality. Kaplan v. Axelrod, W.L. 126884 (S.D.N.Y. 1988). As it pertains to the ruling of this court in denying a preliminary injunction and dissolving a temporary restraining order in the adversary proceeding Donald E. Austin v. Fleetwood Insurance Agency, Inc. (In re: Donald E. Austin, Chapter 11 Case

No. 85-40639) adversary proceeding No. 90-4186 (Bankr. S.D. Ga. order dated November 6, 1990) appeal is the appropriate remedy.

This court is unaware of any provision under §455(b) which would require recusal of a judge because his colleague was disqualified by virtue of previous service as adverse counsel in a related proceeding. Judge Davis did act as lawyer for the

predecessor in interest to the defendant in this proceeding in at least some of the related bankruptcy proceedings involving Mr. Austin. As a result of his disqualification, these related proceedings were referred to me. There exists no basis under §455(b) for my disqualification by virtue of Judge Davis' previous employment.

A determination that no factual basis exists for disqualification does not end the inquiry. In addition to the specific requirements of §455(b), §455(a) requires disqualification "in any proceeding in which [my] impartiality might be reasonably be questioned." 28 U.S.C. §455(a). Under §455(a) it is not necessary that this court determine that in fact a basis for disqualification exists. The test in determining whether a judge should be disqualified under this section is whether a reasonable person knowing all of the circumstances would be lead to conclude that the judge's impartiality might reasonably be questioned. U.S. v. Greenough, supra. Potashnick v. Port City Construction Company, 609 F.2d 1101 (5th Cir. 1980) cert. denied 449 U.S. 820, 101 S.Ct. 78, 66 L.E.2d 22 (1980); Smith v. Pepsico Inc., 434 F.Supp. 524 (S.D. Fla. 1977). From a review of the record in this adversary proceeding as well as the other related bankruptcy proceedings referenced above, this court determines that no reasonable person would conclude that this court harbors bias or prejudice against Mr. Austin and has been partial to any of Mr. Austin's adversaries

in these related matters or has prejudged this adversary proceeding.

A review of the record in each of the related bankruptcy proceedings in reference to the-allegations set forth by Mr. Austin establishes that a reasonable person would not harbour doubts about my impartiality in this and the related proceedings. The appearance of partiality standard is not interpreted to require recusal on spurious or vague charges of partiality as in this case. Smith v. Pepsico, Inc. supra. The mere conclusionary allegations of a predisposition or specific dislike for a party not supported by any specific facts or acts does not support a motion for disqualification or recusal under 455. Hayes v. National Football League, 463 F.Supp. 1174 (C.D. Cal. 1979). The purpose of §455 is not to aid a discontented litigant who seeks to oust a judge simply because he is displeased with the action of the judge in other proceedings. Crider v. Keohane, 484 F.Supp. 13 (W.D. Okla. 1979). The claim of bias and prejudice as in this case may not be used for the purpose of judge or forum shopping. U.S. v. Baker, 441 F.Supp. 612 (M.D. Tenn. 1977). I have as much an obligation not to recuse myself where there is no reason to do so as I do to recuse myself where the converse is true. Cleveland v. Cleveland Electric Illuminating Co., 503 F.Supp. 368 (N.D. Ohio 1980).

A review of the record in this adversary proceeding, the underlying Chapter 11 case and the other related proceedings previously referenced in this order as well as the

allegations made

by Mr. Austin at hearing established no factual basis for disqualification under §455(b) and no basis for a reasonable person with full knowledge of the facts to doubt this court's impartiality in this as well as the related proceedings. While Mr. Austin has not sought my disqualification by motion, based upon his allegations at hearing a final determination is appropriate in order for this and the related proceedings to proceed. It is therefore the findings of this court that no basis for disqualification exists and the allegations of Mr. Austin taken as a motion for disqualification is ORDERED denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 10th day of December, 1990.